

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

SECOND SESSION

**LEGISLATIVE BILL 853**

Introduced by Wightman, 36; Ashford, 20; Council, 11.

Read first time January 11, 2010

Committee: Judiciary

A BILL

1 FOR AN ACT relating to criminal law; to amend sections 28-105,  
2 29-2204, 29-2520, 29-2522, 29-2524, and 83-1,105.01,  
3 Reissue Revised Statutes of Nebraska; to change the  
4 statutes to reflect the Nebraska Supreme Court opinion  
5 State v. Conover, 270 Neb. 446, 703 N.W.2d 898 (2005);  
6 to harmonize provisions; and to repeal the original  
7 sections.

8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 28-105, Reissue Revised Statutes of  
2 Nebraska, is amended to read:

3 28-105 (1) For purposes of the Nebraska Criminal Code and  
4 any statute passed by the Legislature after the date of passage  
5 of the code, felonies are divided into nine classes which are  
6 distinguished from one another by the following penalties which are  
7 authorized upon conviction:

- 8 Class I felony                    Death
- 9 Class IA felony                   Life imprisonment ~~without parole~~
- 10 Class IB felony                   Maximum - life imprisonment
- 11                                    Minimum - twenty years imprisonment
- 12 Class IC felony                   Maximum - fifty years imprisonment
- 13                                    Mandatory minimum - five years imprisonment
- 14 Class ID felony                   Maximum - fifty years imprisonment
- 15                                    Mandatory minimum - three years imprisonment
- 16 Class II felony                   Maximum - fifty years imprisonment
- 17                                    Minimum - one year imprisonment
- 18 Class III felony                   Maximum - twenty years imprisonment, or
- 19                                    twenty-five thousand dollars fine, or both
- 20                                    Minimum - one year imprisonment
- 21 Class IIIA felony                   Maximum - five years imprisonment, or
- 22                                    ten thousand dollars fine, or both
- 23                                    Minimum - none
- 24 Class IV felony                   Maximum - five years imprisonment, or
- 25                                    ten thousand dollars fine, or both

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Minimum - none

(2) All sentences of imprisonment for Class IA, IB, IC, ID, II, and III felonies and sentences of one year or more for Class IIIA and IV felonies shall be served in institutions under the jurisdiction of the Department of Correctional Services. Sentences of less than one year shall be served in the county jail except as provided in this subsection. If the department certifies that it has programs and facilities available for persons sentenced to terms of less than one year, the court may order that any sentence of six months or more be served in any institution under the jurisdiction of the department. Any such certification shall be given by the department to the State Court Administrator, who shall forward copies thereof to each judge having jurisdiction to sentence in felony cases.

(3) Nothing in this section shall limit the authority granted in sections 29-2221 and 29-2222 to increase sentences for habitual criminals.

(4) A person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation.

Sec. 2. Section 29-2204, Reissue Revised Statutes of Nebraska, is amended to read:

29-2204 (1) Except when a term of life imprisonment ~~without parole~~ is required by law, in imposing an indeterminate sentence upon an offender the court shall:

1           (a) (i) Until July 1, 1998, fix the minimum and maximum  
2 limits of the sentence to be served within the limits provided by  
3 law, except that when a maximum limit of life is imposed by the  
4 court for a Class IB felony, the minimum limit may be any term of  
5 years not less than the statutory mandatory minimum; and

6           (ii) Beginning July 1, 1998:

7           (A) Fix the minimum and maximum limits of the sentence  
8 to be served within the limits provided by law for any class of  
9 felony other than a Class IV felony, except that when a maximum  
10 limit of life is imposed by the court for a Class IB felony, the  
11 minimum limit may be any term of years not less than the statutory  
12 mandatory minimum. If the criminal offense is a Class IV felony,  
13 the court shall fix the minimum and maximum limits of the sentence,  
14 but the minimum limit fixed by the court shall not be less than  
15 the minimum provided by law nor more than one-third of the maximum  
16 term and the maximum limit shall not be greater than the maximum  
17 provided by law; or

18           (B) Impose a definite term of years, in which event the  
19 maximum term of the sentence shall be the term imposed by the court  
20 and the minimum term shall be the minimum sentence provided by law;

21           (b) Advise the offender on the record the time the  
22 offender will serve on his or her minimum term before attaining  
23 parole eligibility assuming that no good time for which the  
24 offender will be eligible is lost; and

25           (c) Advise the offender on the record the time the

1 offender will serve on his or her maximum term before attaining  
2 mandatory release assuming that no good time for which the offender  
3 will be eligible is lost.

4           If any discrepancy exists between the statement of  
5 the minimum limit of the sentence and the statement of parole  
6 eligibility or between the statement of the maximum limit of the  
7 sentence and the statement of mandatory release, the statements  
8 of the minimum limit and the maximum limit shall control the  
9 calculation of the offender's term. If the court imposes more  
10 than one sentence upon an offender or imposes a sentence upon  
11 an offender who is at that time serving another sentence, the  
12 court shall state whether the sentences are to be concurrent or  
13 consecutive.

14           (2)(a) When the court is of the opinion that imprisonment  
15 may be appropriate but desires more detailed information as a  
16 basis for determining the sentence to be imposed than has been  
17 provided by the presentence report required by section 29-2261, the  
18 court shall commit an offender to the Department of Correctional  
19 Services for a period not exceeding ninety days. The department  
20 shall conduct a complete study of the offender during that time,  
21 inquiring into such matters as his or her previous delinquency or  
22 criminal experience, social background, capabilities, and mental,  
23 emotional, and physical health and the rehabilitative resources  
24 or programs which may be available to suit his or her needs. By  
25 the expiration of the period of commitment or by the expiration

1 of such additional time as the court shall grant, not exceeding  
2 a further period of ninety days, the offender shall be returned  
3 to the court for sentencing and the court shall be provided  
4 with a written report of the results of the study, including  
5 whatever recommendations the department believes will be helpful to  
6 a proper resolution of the case. After receiving the report and the  
7 recommendations, the court shall proceed to sentence the offender  
8 in accordance with subsection (1) of this section. The term of the  
9 sentence shall run from the date of original commitment under this  
10 subsection.

11 (b) In order to encourage the use of this procedure  
12 in appropriate cases, all costs incurred during the period the  
13 defendant is held in a state institution under this subsection  
14 shall be a responsibility of the state and the county shall  
15 be liable only for the cost of delivering the defendant to the  
16 institution and the cost of returning him or her to the appropriate  
17 court for sentencing or such other disposition as the court may  
18 then deem appropriate.

19 (3) Except when a term of life is required by law,  
20 whenever the defendant was under eighteen years of age at the time  
21 he or she committed the crime for which he or she was convicted,  
22 the court may, in its discretion, instead of imposing the penalty  
23 provided for the crime, make such disposition of the defendant  
24 as the court deems proper under the Nebraska Juvenile Code. Prior  
25 to making a disposition which commits the juvenile to the Office

1 of Juvenile Services, the court shall order the juvenile to be  
2 evaluated by the office if the juvenile has not had an evaluation  
3 within the past twelve months.

4 Sec. 3. Section 29-2520, Reissue Revised Statutes of  
5 Nebraska, is amended to read:

6 29-2520 (1) Whenever any person is found guilty of a  
7 violation of section 28-303 and the information contains a notice  
8 of aggravation as provided in section 29-1603, the district court  
9 shall, as soon as practicable, fix a date for an aggravation  
10 hearing to determine the alleged aggravating circumstances. If no  
11 notice of aggravation has been filed, the district court shall  
12 enter a sentence of life imprisonment, ~~without parole.~~

13 (2) Unless the defendant waives his or her right to a  
14 jury determination of the alleged aggravating circumstances, such  
15 determination shall be made by:

16 (a) The jury which determined the defendant's guilt; or

17 (b) A jury impaneled for purposes of the determination of  
18 the alleged aggravating circumstances if:

19 (i) The defendant waived his or her right to a jury at  
20 the trial of guilt and either was convicted before a judge or was  
21 convicted on a plea of guilty or nolo contendere; or

22 (ii) The jury which determined the defendant's guilt has  
23 been discharged.

24 A jury required by subdivision (2)(b) of this section  
25 shall be impaneled in the manner provided in sections 29-2004 to

1 29-2010.

2 (3) The defendant may waive his or her right to a  
3 jury determination of the alleged aggravating circumstances. The  
4 court shall accept the waiver after determining that it is made  
5 freely, voluntarily, and knowingly. If the defendant waives his  
6 or her right to a jury determination of the alleged aggravating  
7 circumstances, such determination shall be made by a panel of  
8 judges as a part of the sentencing determination proceeding as  
9 provided in section 29-2521.

10 (4)(a) At an aggravation hearing before a jury for the  
11 determination of the alleged aggravating circumstances, the state  
12 may present evidence as to the existence of the aggravating  
13 circumstances alleged in the information. The Nebraska Evidence  
14 Rules shall apply at the aggravation hearing.

15 (b) Alternate jurors who would otherwise be discharged  
16 upon final submission of the cause to the jury shall be retained  
17 during the deliberation of the defendant's guilt but shall not  
18 participate in such deliberations. Such alternate jurors shall  
19 serve during the aggravation hearing as provided in section 29-2004  
20 but shall not participate in the jury's deliberations under this  
21 subsection.

22 (c) If the jury serving at the aggravation hearing is  
23 the jury which determined the defendant's guilt, the jury may  
24 consider evidence received at the trial of guilt for purposes  
25 of reaching its verdict as to the existence or nonexistence of

1   aggravating circumstances in addition to the evidence received at  
2   the aggravation hearing.

3           (d) After the presentation and receipt of evidence at  
4   the aggravation hearing, the state and the defendant or his or her  
5   counsel may present arguments before the jury as to the existence  
6   or nonexistence of the alleged aggravating circumstances.

7           (e) The court shall instruct the members of the jury  
8   as to their duty as jurors, the definitions of the aggravating  
9   circumstances alleged in the information, and the state's burden to  
10  prove the existence of each aggravating circumstance alleged in the  
11  information beyond a reasonable doubt.

12           (f) The jury at the aggravation hearing shall deliberate  
13  and return a verdict as to the existence or nonexistence of each  
14  alleged aggravating circumstance. Each aggravating circumstance  
15  shall be proved beyond a reasonable doubt. Each verdict with  
16  respect to each alleged aggravating circumstance shall be  
17  unanimous. If the jury is unable to reach a unanimous verdict  
18  with respect to an aggravating circumstance, such aggravating  
19  circumstance shall not be weighed in the sentencing determination  
20  proceeding as provided in section 29-2521.

21           (g) Upon rendering its verdict as to the determination of  
22  the aggravating circumstances, the jury shall be discharged.

23           (h) If no aggravating circumstance is found to exist, the  
24  court shall enter a sentence of life imprisonment. ~~without parole.~~  
25  If one or more aggravating circumstances are found to exist, the

1 court shall convene a panel of three judges to hold a hearing  
2 to receive evidence of mitigation and sentence excessiveness  
3 or disproportionality as provided in subsection (3) of section  
4 29-2521.

5 Sec. 4. Section 29-2522, Reissue Revised Statutes of  
6 Nebraska, is amended to read:

7 29-2522 The panel of judges for the sentencing  
8 determination proceeding shall either unanimously fix the sentence  
9 at death or, if the sentence of death was not unanimously agreed  
10 upon by the panel, fix the sentence at life imprisonment. ~~without~~  
11 ~~parole.~~ Such sentence determination shall be based upon the  
12 following considerations:

13 (1) Whether the aggravating circumstances as determined  
14 to exist justify imposition of a sentence of death;

15 (2) Whether sufficient mitigating circumstances exist  
16 which approach or exceed the weight given to the aggravating  
17 circumstances; or

18 (3) Whether the sentence of death is excessive or  
19 disproportionate to the penalty imposed in similar cases,  
20 considering both the crime and the defendant.

21 In each case, the determination of the panel of judges  
22 shall be in writing and refer to the aggravating and mitigating  
23 circumstances weighed in the determination of the panel.

24 If an order is entered sentencing the defendant to death,  
25 a date for execution shall not be fixed until after the conclusion

1 of the appeal provided for by section 29-2525.

2           Sec. 5. Section 29-2524, Reissue Revised Statutes of  
3 Nebraska, is amended to read:

4           29-2524 Nothing in sections 25-1140.09, 28-303, 28-313,  
5 and 29-2519 to 29-2546 shall be in any way deemed to repeal  
6 or limit existing procedures for automatic review of capital  
7 cases, nor shall they in any way limit the right of the Supreme  
8 Court to reduce a sentence of death to a sentence of life  
9 imprisonment ~~without parole~~ in accordance with the provisions of  
10 section 29-2308, nor shall they limit the right of the Board of  
11 Pardons to commute any sentence of death to a sentence of life  
12 imprisonment without parole.

13           Sec. 6. Section 83-1,105.01, Reissue Revised Statutes of  
14 Nebraska, is amended to read:

15           83-1,105.01 Except when a term of life imprisonment  
16 ~~without parole~~ is required by law, in imposing an indeterminate  
17 sentence upon an offender the court shall:

18           (1) Fix the minimum and maximum limits of the sentence  
19 to be served within the limits provided by law for any class of  
20 felony other than a Class IV felony, except that when a maximum  
21 limit of life is imposed by the court for a Class IB felony, the  
22 minimum limit may be any term of years not less than the statutory  
23 mandatory minimum. If the criminal offense is a Class IV felony,  
24 the court shall fix the minimum and maximum limits of the sentence,  
25 but the minimum limit fixed by the court shall not be less than

1 the minimum provided by law nor more than one-third of the maximum  
2 term and the maximum limit shall not be greater than the maximum  
3 provided by law;

4 (2) Impose a definite term of years, in which event the  
5 maximum term of the sentence shall be the term imposed by the court  
6 and the minimum term shall be the minimum sentence provided by law;  
7 or

8 (3) (a) When the court is of the opinion that imprisonment  
9 may be appropriate but desires more detailed information as a  
10 basis for determining the sentence to be imposed than has been  
11 provided by the presentence report required by section 29-2261, the  
12 court shall commit an offender to the Department of Correctional  
13 Services for a period not exceeding ninety days. The department  
14 shall conduct a complete study of the offender during that time,  
15 inquiring into such matters as his or her previous delinquency or  
16 criminal experience, social background, capabilities, and mental,  
17 emotional, and physical health and the rehabilitative resources  
18 or programs which may be available to suit his or her needs. By  
19 the expiration of the period of commitment or by the expiration  
20 of such additional time as the court shall grant, not exceeding  
21 a further period of ninety days, the offender shall be returned  
22 to the court for sentencing and the court shall be provided  
23 with a written report of the results of the study, including  
24 whatever recommendations the department believes will be helpful to  
25 a proper resolution of the case. After receiving the report and the

1 recommendations, the court shall proceed to sentence the offender  
2 in accordance with any applicable provision of law. The term of the  
3 sentence shall run from the date of original commitment under this  
4 subdivision.

5 (b) In order to encourage the use of this procedure  
6 in appropriate cases, all costs incurred during the period the  
7 offender is held in a state institution under this subdivision  
8 shall be the responsibility of the state and the county shall  
9 be liable only for the cost of delivering the offender to the  
10 institution and the cost of returning him or her to the appropriate  
11 court for sentencing or such other disposition as the court may  
12 then deem appropriate.

13 Sec. 7. Original sections 28-105, 29-2204, 29-2520,  
14 29-2522, 29-2524, and 83-1,105.01, Reissue Revised Statutes of  
15 Nebraska, are repealed.